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CRIMINAL PROCEDURE—COMMENT ON DEFENDANT'S FAILURE TO TESTIFY—*Davis v. State*, 406 So.2d 795 (Miss. 1981)

Malcolm Joe Davis was convicted of rape in the Circuit Court of Pearl River County, Mississippi. Two confessions were included in the evidence the state had obtained against Davis. At a pretrial suppression hearing conducted to determine the admissibility of these confessions, they were admitted over the arguments of Davis that they were involuntarily given. During the trial-in-chief, the prosecuting attorney made reference to the time the confessions were given and stated that "all the defendant had to do at that time was to deny that he committed the offense."[1] Davis' counsel promptly objected to the prosecutor's remarks, entered a motion for a mistrial, and was overruled on both points. The defense counsel, however, failed to preserve the prosecutor's statement for the record. What does appear in the record is an account of the events as dictated into the record by the trial judge.

On appeal, the defendant contended that the trial court's actions denied Davis his rights to a fair trial under the fifth and fourteenth amendments.[2] Davis argued that by allowing the prosecutor to comment on the defendant's failure to testify, the trial court denied the accused the rights guaranteed by these amendments.[3]

The Mississippi Supreme Court, in an eight to one decision, disagreed and affirmed Davis' conviction. The court based its decision on the fact that the defense did not preserve the statement for the record.[4] In such a situation the court simply assumes that the trial judge ruled correctly. Siding with the defendant in a dissenting opinion, Justice Hawkins argued that the trial court's actions violated not only the defendant's constitutional rights but his statutory rights as well.[5]

Background and History

Mississippi statutorily provides that an accused is a competent witness in any prosecution against him.[6] The code further adds that "the failure of the accused, in any case, to testify shall

1. Davis v. State, 406 So. 2d 795, 801 (Miss. 1981).
2. *Id.* at 797. Though Davis assigned numerous errors, the scope of this note will be limited to the allegation of improper comment on the defendant's failure to testify.
3. *Id.*
4. *Id.* at 801.
5. *Id.* at 802 (Hawkins, J., dissenting).
6. MISS. CODE ANN. § 13-1-9 (1972).

not, however, operate to his prejudice or be commented on by counsel."[7] This principle has been followed through the years dating back to the statute's inception in 1882.[8] Through seven code revisions the language of this provision has not changed. Such persistence on the part of the legislature together with the simple and precise wording of the statute seems to indicate the drafter's intention that the prosecutor may not comment on the defendant's failure to testify. However, despite such indications from the legislature, the courts have devised exceptions to this general rule.

The Mississippi Supreme Court seemingly settled the question concerning a comment on defendants failure to testify nearly a century ago in *Yarbrough v. State.*[9] In *Yarbrough*, the prosecuting attorney included in his argument the statement that "the defendant has not taken the stand, which is his privilege under the law, and no inference can be drawn from the fact."[10] At this point, the trial judge stopped the prosecuting attorney and directed him not to continue in that direction. The attorney nevertheless continued, "unfortunately for the defendant, he has not, in this case, for he has immolated himself on an altar of his own erection."[11] In construing section 1741 of the 1892 code, the supreme court stated that the statute "forbids, in unmistakable language, any comment, friendly or unfriendly."[12] The court emphatically stated that the statute "forbids any remark, of any character, in any words, upon the failure of the accused to testify."[13] The defendant's conviction was consequently reversed. This position was reiterated in the case of *Reddick v. State.*[14] The prosecutor in *Reddick* had made reference to an alleged admission by the defendant saying "[a]nd he has not denied it." Upon objections by defense counsel the prosecutor corrected himself by saying "[i]t has not been denied."[15] Speaking for the majority in *Reddick*, Justice Woods wrote that even though a prosecutor does not intend to refer to the fact that the defendant did not testify, a comment is nevertheless improper so long as it "could be reasonably construed to be a comment . . . upon the failure of

7. *Id.*

8. 1882 MISS. LAWS ch. 78. The provision was provided in the following codes: MISS. CODE § 1603 (1880); MISS. CODE § 1741 (1892); MISS. CODE § 1918 (1906); MISS CODE § 1578 (1917); MISS. CODE § 1530 (1930); MISS. CODE ANN. § 1691 (1942).

9. 70 Miss. 593, 12 So. 551 (1893).

10. *Id.* at 594, 12 So. at 551.

11. *Id.*

12. *Id.*

13. *Id.*

14. 72 Miss. 1008, 16 So. 490 (1895).

15. *Id.* at 1009, 16 So. at 490.

the accused to testify."[16] Justice Woods went on to say that curative instructions to the jury would be fruitless for they "could not . . . undo the wrong already done."[17] In 1906 in *Smith v. State*[18] the court was again asked to decide the issue. Factually, *Smith* presented to the court a homicide at which four people were present: the defendant, the deceased, and two witnesses, both of whom testified for the state. After all the witnesses to the homicide had testified, with the exception of the defendant, the prosecutor remarked that "no one had denied that he [the defendant] killed Buchanan."[19] Thus at the time the statement was made only the defendant could have issued a denial. In reversing the defendant's conviction, the court maintained that the "impression irresistibly conveyed" by the prosecutor's comments was "that a failure to deny should be construed as a silent admission."[20] Such an impression, it was argued, is the very thing that the law was intended to prevent. *Smith* turns on a literal interpretation of the statute. Any comment on the defendant's failure to testify is prohibited; "this is true without regard to the character of the comment, or the motive or intent with which it is made."[21] By 1906, after these three cases, the question seemed settled. Under no circumstances would a comment on the defendant's failure to testify be tolerated. This premise, however, was threatened by the decision in *Prince v. State*[22] in 1908.

In *Prince*, during the trial the prosecuting attorney made the statement that the "confession stands uncontradicted before you today." In reversing Prince's conviction, the court held that any reference to the defendant's failure to testify "of any character whatever . . . constitutes reversible error."[23] But more importantly, Chief Justice Whitfield, author of the opinion, made his feelings on the subject clear. He argued that the legislature should amend the statute to preclude reversal in every case no matter how subtle the comment might have been. Justice Whitfield reasoned that the literal holdings of *Yarbrough, Reddick* and the statute would require the court to reverse a murder conviction "in which the evidence showed overwhelmingly, beyond any reasonable doubt, a case of cold-blooded assassination, without

16. *Id.*
17. *Id.*
18. 87 Miss. 627, 40 So. 229 (1906).
19. *Id.* at 628, 40 So. at 230.
20. *Id.*
21. *Id.*
22. 93 Miss. 263, 46 So. 537 (1908).
23. *Id.* at 266, 46 So. at 538.

any defense whatever on the merits."[24] Further, this would be so, Whitfield warned, solely because the defendant did not testify and the state's attorney commented on this fact. Justice Whitfield concluded that since the jury is already aware of the fact that the defendant did not testify, the comment should simply be treated as any other error.[25] If the premise that any comment is prohibited was threatened in *Prince,* it was physically wounded in *Drane v. State*[26] decided the same year as *Prince.*

Drane presented to the court another murder conviction. Here, a man named Latham had overheard a conversation between the defendant and a man named Burns. After Latham had testified as to what he heard, the prosecutor made the comment that "nobody on earth has denied what Lawrence Latham said about this."[27] This time, however, the court affirmed the conviction concluding that Burns could have denied Latham's testimony. Indeed, it is Burns' presence that provides the critical difference between *Prince* and *Drane.* In *Prince* only the defendant could have denied the evidence, whereas in *Drane* not only could the defendant have denied the evidence but so could have Burns. These early cases begin to formulate the test by which a comment on the defendant's failure to testify is to be judged. No comment will be allowed unless the statement could have referred to one other than the defendant. This principle was upheld in 1946 in *Martin v. State.*[28]

In *Martin,* the prosecutor made reference to the accused and said that his incriminating actions were "undisputed."[29] In reversing Martin's conviction for obtaining money under false pretenses, the Mississippi Supreme Court held that since only the defendant could have denied his own actions the prosecutor's statements were improper. The same results were reached in *Winchester v. State.*[30] The fatal error occurred in *Winchester* when the county attorney asked, "what defense has been shown here? There is no denial that he killed her." The error was compounded by the district attorney when he said, "Not a single soul has said she was not shot as this Darden woman has told you."[31] The court found that since under the circumstances of the case only two people, the defen-

24. *Id.* at 267, 46 So. at 538.
25. *Id.*
26. 92 Miss. 180, 45 So. 149 (1908).
27. *Id.* at 184, 45 So. at 149.
28. 200 Miss. 142, 26 So. 2d 169 (1946).
29. *Id.* at 156, 26 So. 2d at 171.
30. 163 Miss. 462, 142 So. 454 (1932).
31. *Id.* at 473, 142 So. at 456.

dant and the state's witness, could deny the evidence, the remarks were an improper comment on the defendant's failure to testify.

A second exception to the no comment rule was carved out in *House v. State.*[32] Though whether the prosecutor's remark in *House* amounted to a comment on the defendant's failure to testify was questionable, the court conceded for the sake of argument that it was such a comment. Nevertheless, the defendant's murder conviction was upheld. The court declared that the defendant could not have been prejudiced by the statement since the evidence of guilt weighed so heavily against him. The court stated that "the jury could not, under their oaths, have arrived at any verdict other than one of guilty."[33] Thus the court adopts the second exception to the general rule that no comment whatsoever may be made upon the defendant's failure to testify. This exception also seizes upon Justice Whitfield's comments in *Prince v. State.*[34] With this exception, no longer would a "cold-blooded assassin" escape punishment merely because the prosecutor made an improper comment on the defendant's exercise of his right not to testify. These two exceptions to the rule were first recognized together in the case of *Lambert v. State.*[35]

In *Lambert,* the prosecutor made the statement "where is the testimony that he did not do it . . . There is no denial."[36] After reviewing the cases on point, the court concluded that a comment on the defendant's failure to testify warranted a reversal unless "1) there was an eye-witness other than defendant available to the accused and who was not placed upon the stand by him, or 2) the guilt of defendant was so manifest that no fair jury could have returned a verdict other than guilty."[37] Justice Robards, writing for the majority, held that the prosecutor's statements did not fall within either of the two exceptions. The defendant's robbery conviction was consequently reversed. As Justice Whitfield had in *Prince,* Justice Robards in *Lambert* expressed dismay over the operation of the controlling statute. He maintained that a prosecutor's comments should not force a reversal when they do nothing more than call to the attention of the jury the fact that the defendant did not testify. Indeed, that the defendant did not testify is a fact that is readily apparent to the jury.[38] Since *Lambert,*

32. 121 Miss. 436, 83 So. 611 (1920).
33. *Id.* at 437, 83 So. at 611-12. Citing Wells v. State, 96 Miss. 500, 51 So. 209 (1910).
34. 93 Miss. 263, 267, 46 So. 537, 538 (1908).
35. 199 Miss. 790, 25 So. 2d 477 (1946).
36. *Id.* at 792, 25 So. 2d at 477.
37. *Id.* at 797, 25 So. 2d at 479-80.
38. *Id.* at 799, 25 So. 2d at 480.

Mississippi cases generally have fallen into one of these two categories. There has been either a reversal due to an unlawful comment on the defendant's failure to testify,[39] or one of the two recognized exceptions has operated resulting in affirmation of the lower court's decision.[40]

However, a third group of cases which do not readily fit into any of the recognized categories should be considered. These cases center around a prosecutor's statement that the state's evidence remains undenied or uncontradicted. Either no reference is made to the defendant directly or the reference is directed towards the commission of the crime. For instance, in *Johnson v. State*[41] the state's attorney argued that "the testimony for the state was uncontradicted."[42] On appeal, the Mississippi Supreme Court did not agree that this was an indirect comment on the defendant's failure to testify. The court noticed that the sole evidence produced in the trial was that of the state. To forbid the prosecutor to mention this fact under the guise of an improper comment on the defendant's failure to testify would be "to deny to the state the privilege of arguing the case at all."[43] A similar comment was made in *Baird v. State.*[44] In *Baird,* the prosecutor made the remark that "the testimony for the state shows that in this case a cold-blooded murder has been done, and it is undisputed."[45] This, too, was held not to be an improper comment on the defendant's failure to testify. The categorization of these cases is difficult. Justice Robards in *Lambert* is hard pressed to find a slot for *Johnson.*[46] The statements made in these cases appear to be improper comments upon the defendant's failure to testify. Who could better contradict the evidence than the accused himself? However, an analysis of the statements and the context in which they were made illustrates that the statements were not improper. In *Johnson,* the statement "the testimony for the state was uncontradicted"[47] refers

39. *See, e.g.*, Peterson v. State, 351 So. 2d 113 (Miss. 1978); Clark v. State, 260 So. 2d 445 (Miss. 1972).

40. *See* Barnes v. State, 230 Miss. 299, 92 So. 2d 863 (1957) (wherein a prosecutor's comment was held harmless since the statement did not go to the guilt of the defendant and could have been disputed by persons other than the defendant); Bramlett v. State, 37 So. 2d 305 (Miss. 1948) (in which an improper comment was held harmless since there was no dispute as to who committed the crime).

41. 109 Miss. 622, 68 So. 917 (1915).

42. *Id.* at 623, 68 So. at 917.

43. *Id.* at 623-24, 68 So. at 917.

44. 146 Miss. 547, 112 So. 705 (1927).

45. *Id.* at 551, 112 So. at 706.

46. 199 Miss. at 797, 25 So. 2d at 479-80.

47. *Id.* at 796, 25 So. 2d at 479.

not to any specific matter but to the whole of the state's evidence. Whereas a statement such as "where is the testimony that he did not do it" does refer to a specific matter: the crime itself as opposed to the evidence in general. Also, the word "uncontradicted" speaks generally and "does not convey the meaning of a personal denial" as does the statement "There is no denial."[48] In *Baird,* the statement could be classed not as a comment on the defendant's failure to testify, but as a reference to the fact that a crime has been committed. The prosecutor's statement in *Baird* does not draw attention to the fact that the defendant has failed to testify but only to the fact that a crime has been committed by someone.

The *Griffin* Rule

The United States Supreme Court similarly had difficulty with a strict rule of no comment. As in Mississippi, the Supreme Court began with a hard fast rule of no comment and subsequently softened the rule. The issue was first addressed by the Supreme Court in 1893 in *Wilson v. United States.*[49] *Wilson* concerned an interpretation of a federal statute[50] identical to the Mississippi statute. In holding that it is reversible error for a prosecutor to violate the act by commenting on the defendant's failure to testify, the court stated that the act was designed with "due regard . . . to those who might prefer to rely upon the presumption of innocence which the law gives to everyone, and not wish to be witnesses."[51] The court argues that it is difficult for most to take the stand even though they may be entirely innocent. For timidity, nervousness and fear that evidence of other crimes may be brought out on cross-examination tends to "confuse and embarass" the defendant so that his testimony may operate to his detriment rather than to his advantage. The court concludes, "It is not everyone, however honest, who would, therefore, willingly be placed on the witness stand."[52] Many years later, the court affirmed this position in *Griffin v. California.*[53]

In *Griffin,* the prosecutor had taken full advantage of a California consititutional provision[54] which allowed comment on the

48. *Id.*
49. 149 U.S. 60 (1893).
50. Act of March 16, 1878, ch. 37, 20 Stat. 30 (1878) (current version at 18 U.S.C. § 3481 (1948)).
51. 149 U.S. at 66.
52. *Id.*
53. 380 U.S. 609 (1965).
54. CAL. CONST. art. 1 § 13.

defendant's failure to explain or deny by his testimony any evidence presented. The trial judge had also followed California's constitution by instructing the jury that although the defendant had a right not to testify, his failure to deny or explain the evidence could be taken into consideration.[55] There thus exists a difference between *Griffin* on the one hand and *Wilson* on the other. Both Wilson and the Mississippi cases involve an interpretation of statutes, phrased in negative terms, that comment is expressly forbidden. *Griffin,* on the other hand, involves a state constitutional provision phrased in positive terms, that comment is expressly allowed. Thus whether comment is proper in *Griffin* necessarily rests upon federal constitutional grounds. Writing for the court in *Griffin,* Justice Douglas began the opinion by noting this difference. Had this been a federal trial, he says, *Wilson* and the present statute[56] would mandate reversal.[57] But this is not a federal trial and the court stated the issue in *Griffin* to be "whether, statute or not, the comment rule, approved by California, violates the Fifth Amendment."[58] In reaching the conclusion that the self-incrimination clause of the Fifth Amendment does indeed forbid not only "comment by the prosecutor on the accused's silence" but also "instructions by the court that such silence is evidence of guilt,"[59] the Court adopts a penalty theory. By allowing comment on the defendant's failure to take the stand, Justice Douglas argues, the Court would impose a penalty on the defendant for exercising his constitutional privilege. "It cuts down on the privilege," he says "by making its assertion costly."[60] In reaching this decision, the court rejected the argument that it is "natural and irresistable" to infer guilt from the defendant's failure to testify by saying that "[w]hat the jury may infer, given no help from the court is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."[61]

Justice Stewart, however, did not accept this position. In a dissent, Stewart criticized the majority's penalty theory and opted for a compulsion theory. The fifth amendment states that no person "shall be compelled in any criminal case to be a witness against

55. 380 U.S. at 610.
56. 18 U.S.C. §3481 (1948).
57. 380 U.S. at 612.
58. *Id.* at 613.
59. *Id.* at 615.
60. *Id.* at 614.
61. *Id.*

himself."[62] Therefore, Stewart reasoned that the question to be decided is "whether the [defendant] has been 'compelled . . . to be a witness against himself.' "[63] Stewart, of course, would answer this question in the negative. If there was compulsion in Griffin's case, he argued, it was of a "dramatically different and less palpable nature than that involved in the procedures which historically gave rise to the Fifth Amendment."[64] Stewart would sustain California's constitutional provision which allowed comment on the defendant's failure to testify.

Griffin concludes that any comment upon the defendant's failure to testify is prohibited. However, the Supreme Court modified this holding in *Chapman v. California.*[65] The question in *Chapman* was not whether the prosecutor's comments amounted to a violation of the *Griffin* rule since they obviously did. Rather, the question was under what circumstances would a violation of the *Griffin* rule constitute reversible error. In answer, the court declared that only those statements that are "harmless beyond a reasonable doubt" will be tolerated.[66] It should be noted that some states have gone beyond this mandate and have applied a much harsher rule holding that any comment on the defendant's failure to testify is error.[67] This is the context in which *Davis v. State* was decided.

Analysis

Since the defense counsel did not preserve the prosecutor's closing argument for the record by a bill of exceptions, the majority in *Davis* assumed that the lower court's ruling in the matter was correct. "Without the precise words of the argument," the court said, "or the context in which it was made, we have difficulty in determining a reasonable conclusion of the statement or in determining possible prejudicial effect on the jury's verdict."[68]

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62. U.S. CONST. amend. V, § 3. The fifth amendment was applied to the states through the fourteenth amendment in Malloy v. Hogan, 378 U.S. 1, 3 (1964).

63. 380 U.S. at 620.

64. *Id. See also* M. Berger, TAKING THE FIFTH 77 (1980). Though comment on the defendant's failure to testify surely represents a pressure to testify, it is not of the "magnitude of the techniques out of which the privilege evolved." *Id.*

65. 386 U.S. 18 (1967).

66. *Id.* at 24.

67. Some courts have gone farther than the U.S. Constitution mandates and hold that any comment is a violation of the *Griffin* rule. The rationale for such a requirement is that such a comment is so prejudicial by its very nature as to require automatic reversal. *See* State v. Wright, 251 La. 511, 205 So. 2d 381 (1968); State v. Smith, 101 Ariz. 407, 420 P.2d 278 (1966); Sanders v. State, 216 Tenn. 425, 392 S.W.2d 916 (1965).

68. 406 So. 2d at 801.

The majority reaches this conclusion despite the fact that the trial judge entered into the record an account of the events that took place.

In the dissent, Justice Hawkins was of the opinion that the record was adequate to justify a reversal. Relying on *Lambert* and *Reddick*, Hawkins reiterated that "no comment whatsoever shall be made upon the defendant's failure to testify . . . ."[69] According to Justice Hawkins, the statement made by the prosecutor amounted to a violation of the defendant's statutory and constitutional rights. "For twelve jurors under those circumstances . . . not [to] instantly be alerted by this comment [that] the defendant could have denied his guilt as a witness from the witness chair, each would first require a lobotomy."[70] Finally, Justice Hawkins said that he thought it strange that the state would make such a comment with the evidence of guilt so strong.[71]

Where then does *Davis* fit in the categories provided in *Lambert*? What effect should *Chapman* have on *Davis*? What is the status of the no comment rule? These questions have no definite answer. Although *Davis* was decided on the fact that the defense counsel failed to preserve an adequate record, the decision is nevertheless sound. *Lambert* provided two exceptions to the no comment rule. One of those exceptions provided such an error should be held harmless when "the guilt of the defendant was so manifest that no fair jury could have returned a verdict other than guilty."[72] This is the situation in *Davis*. Even Justice Hawkins in his dissent thought it strange that the state made the comment "with the proof of the guilt of the defendant so strong."[73] Even if an adequate record had been made, the court would have been justified in reaching the same conclusion under *Lambert*. It is interesting that though the dissent cited *Lambert*, it failed to follow the line of cases that provides one of the exceptions to the no comment rule. Perhaps though the dissent was not incorrect in its assumption that Davis' conviction should have been overturned due to an improper comment on defendant's failure to testify. That is, perhaps Davis has rights in addition to those passed upon by *Lambert* and by those cases that follow. *Lambert* and the line of cases that follow provide an interpretation of the defendant's *statutory* rights. What of the defendant's fifth amendment rights?

69. *Id.* at 802 (Hawkins, J., dissenting).
70. *Id.*
71. *Id.*
72. 199 Miss. 790, 799, 25 So. 2d 477, 480.
73. 406 So. 2d at 803, (Hawkins, J., dissenting).

Chapman v. California provides this answer since it was held therein that a *"Griffin"* violation was permissible only if the statement was "harmless beyond a reasonable doubt."[74] Thus the question becomes, "was the prosecutor's comment in *Davis* harmless beyond a reasonable doubt?" The answer to this question depends much more on the exact words of the prosecutor than does a *Lambert* approach. In this respect, the majority was clearly correct when it stated that it traditionally has declined to "rule in matters not preserved in the record in sufficient detail for purposes of appeal."[75]

Whatever the result of this conjecture might be, one thing is clear. Comment on the defendant's failure to testify is an elusive issue. Despite a seemingly clear and unequivical code provision, the cases have carved out exceptions as to when a comment will be allowed and when it will not. However, one point does seem clear. A defendant cannot sit silently and claim that the prohibition against comment on his failure to testify protects him from any evidence legitimately presented. As Wharton has pointed out, "The prohibition against adverse comment and inference does not protect the defendant from the probative force of the evidence against him. If a defendant does not attempt to rebut incriminating facts he cannot, merely by remaining silent, escape the natural and reasonable inferences deducible from such facts."[76] However, prosecutors who might abuse the liberties provided by *Tutle v. State*[77] and Wharton are warned in *Harwell v. State*[78] that "counsel should be given wide discretion to matters in evidence in their argument, but only as to 'those matters in evidence.' "[79] It is this very point that the U.S. Supreme Court makes in *Griffin* when it states that "what the jury may infer given no help of the court is one thing. What it may infer when the court solemnized the silence of the accused against him is quite another."[80]

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74. Chapman v. California, 386 U.S. 18, 24 (1966).

75. 406 So. 2d at 801.

76. 1 WHARTON'S CRIMINAL EVIDENCE § 146 at 277 (1955). *Accord* Tuttle v. State, 252 Miss. 733, 174 So. 2d 345 (1965) wherein the court stated, "While a person may remain silent where circumstances would require a prompt explanation consistent with innocence, inference may be drawn from such silences in favor of guilt." *Id.* at 739, 174 So. 2d at 347.

77. 252 Miss. 733, 174 So. 2d 345 (1965).

78. 129 Miss. 858, 93 So. 366 (1922).

79. *Id.* at 864, 93 So. at 368.

80. 380 U.S. 609, 614.